Survivorship and Article 8 of the Human Rights Act 1998

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Introduction

In an article in a previous edition of the journal, I outlined an argument based on Art 14 of Sch. 1 of the Human Rights Act 1998 to challenge the 'no second succession' provisions of the Housing Act 1985.[1] That challenge was formulated as a '*Kay* Gateway A' argument, ie an attack on the provisions of the law itself, rather than to the use of the law by a local authority qua landlord or the application of the law by a court. In this article I put forward a similar argument in relation to the doctrine of survivorship.[2]

The problem

The scenario will be a familiar one to many housing lawyers. Your client is D2. The Claimant (C), a local authority or a housing association, qua landlord seeks possession from two defendants, D1 and D2. Against D1, C claims that D1 succeeded qua joint assured or secure tenant of the premises through the doctrine of survivorship to a sole tenancy when her/his ex-husband/wife (X), with whom he/she shared the joint tenancy, died. D1 had left X and their family home many years ago, and so when X died the tenancy immediately lost assured or secure status and has been determined by a valid notice to quit. Against D2, who was X's partner[3] when X died and who has occupied the premises for years as her/his home, C claims she/he is a trespasser.

Solihull MBC v Hickin offered a variation of these facts[4] In *Hickin*, D2 was the daughter of X and D1 was X's long separated ex-husband and joint tenant. Unhappily (but not unusually) X had never sought to have the tenancy transferred to her as sole tenant (under the Matrimonial Causes Act 1973 or Family Law Act 1996). If not for the doctrine of survivorship D2 would have been an entitled successor to the secure tenancy when her

[1] I. Loveland, "Secure tenancies and second successions" [2015] *Journal of Housing Law* ----.

[2] A fuller version of this argument has been published as I. Loveland, "Analysing the doctrine of survivorship in joint tenancies of people's homes from a human rights perspective"' [2015] *The Conveyancer and Property Lawyer* 47.

[3] For assured tenancies. In pre-2012 secure tenancies D2 might alternatively be a qualifying family member per Housing Act 1985 s.113.

[4] [2012] UKSC 39; [2012] 1 W.L.R. 2295.

mother died. The Supreme Court divided 3-2[5] in *Hickin* in response to arguments for D2 to the effect that the text and purpose of the 1985 Act could be read to disapply the survivorship doctrine when D1 was not living in the house his only or principal home when X died.

The argument made here was not offered in *Hickin*. It is structured in this way.

There is more to Art 8 than assessing the proportionality of eviction

It is important to emphasise that Art 8 is concerned with the legal details of occupancy entitlements, not simply occupancy per se. *Ghaidan v Mendoza*[6] makes this point clearly. Mr Mendoza's successful defence meant that he would occupy in his home as a protected tenant under the Rent Act 1977, not as assured tenant under the Housing Act 1988. As a protected tenant, he enjoyed a much more valuable bundle of legal rights than he would as an assured tenant. But his occupancy of his home was never at stake: Art 8 and Art 14 were relevant because the legal details of his occupancy were in issue.

Similarly, a successful Art 8 defence against the service of a notice to quit does not just afford the defendant a contingent entitlement to remain in occupation for so long as it would not be proportionate for a court to order her eviction. Rather, its effect is to restore a tenancy - and the rights it contained - that had ostensibly been terminated.

One can also see this principle in play in ECtHR case law considering the significance of Art 8 in nuisance cases. For example, in *Moreno Gomez v Spain*[7] the ECtHR noted:

> 53 …. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home.
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> 55….. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para.1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para.2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

In our hypothetical case, our client D2 is completely excluded from enjoying any of the amenities of her home by the doctrine of survivorship. What D2 would be seeking to do is persuade the court that it has a jurisdiction to consider whether in her case it is appropriate for D1 rather than her (D2) to succeed to the tenancy; ie to balance 'competing interests'. If the premises are also D1's home and one might doubt that there would be any legitimate role for Art 8 to play in determining how domestic law should order those competing interests. But in D2's case, that 'competition' does not arise.

The premises in issue have been D2's home for several, perhaps many years. They are where she lived with her partner; where she has carried on her family life. But because of the doctrine of survivorship she is in legal terms as a trespasser in her home. Because of the

[5] Lords Sumption, Hope and Walker were the majority. Lords Mance and Clarke dissented.

[6] [2004] UKHL 30; [2004] 2 A.C. 557.

[7] *(*2005) 41 E.H.R.R. 40.

doctrine of survivorship she is consigned to a formal legal status which is wholly inconsistent with the social reality underlying her presence in her home. In complete contrast, the premises have not been home for many years. None of her family life is there. Her formal legal status as the sole tenant wholly inconsistent with the social reality underlying her absence from the premises. To put the matter very starkly, D2 obviously has a considerable Art 8 interest in the house, and D1 has absolutely no Art 8 interest all.

A question of 'respect'

What might be meant by the Art 8 notion of 'respect' in schedule 1 of the Human Rights Act 1998? Obviously a court must (per s.2 of the Human Rights Act 1998) consider the views of the ECtHR as to the meaning of Art 8 ECHR when addressing this question. But we ought not to forget that 'respect' in Art 8 of Sch. 1 is a statutory provision. As such, its presumptive meaning as a legal concept is controlled by its commonly accepted meaning in everyday language. The Concise Oxford Dictionary defines 'respect' in this way:

'1. regard with deference, esteem or honour. 2 a avoid interfering with, harming, degrading, insulting, injuring or interrupting. b treat with consideration…..'

One cannot credibly say that the doctrine of survivorship respects D's interests in her home in that sense. To the contrary, it wholly ignores them. They are not just interrupted or injured or harmed: they are completely destroyed. A trial court cannot afford them least consideration. There is no respect in the Art 8 sense in the doctrine of survivorship. The rule requires that a court applies a rigid legal rule with no regard at all to empirical reality.

Reconsidering the substance of the common law rule

The ECtHR regards such formalism as incompatible with Art 8's protection of respect for family life. The point is best put in *Emonet v Switzerland*[8]

86 …..["R]espect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended…..

C in our case can readily be portrayed as asking the court to invoke a: "blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended". One might suggest that such undiscerning legal formalism is the very epitome of *disrespect* for a Convention Right.

It could be argued in support of the compatibility of the doctrine that if there was anything unacceptable about it then Parliament would have taken steps to modify or abolish it. And since Parliament has not done so, it would be constitutionally improper for a court to do so. That is however a simplistic argument. Art 8 can quite properly be seen as a source of general constitutional principles about the nature of law and lawmaking rather than simply a collection of micro-level rules about privacy, or housing, or family life. The most useful and important case on the point is perhaps of the House of Lords' judgment in *Campbell v MGN*.[9]

[8] (2009) 49 E.H.R.R. 11.

[9] [2002] UKHL 22; [2004] 2 A.C. 457.

In *Campbell*, the court reshaped the common law tort of breach of confidence to protect Ms Campbell's privacy interests under Art 8 even though Parliament had for many years taken no such steps itself. The court indicated that re-evaluation of the common law was appropriate because the HRA required this when what was in issue was a common law rule which subsists without ever having been subject to rigorous judicial or legislative consideration of its compliance with a Convention Right.

There is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of the rule of survivorship. The rule has never been subject to legislative consideration. And neither have the higher courts yet considered the doctrine in the light of Art 8. In consequence, the doctrine pays no 'respect' to D2'as interests either as a matter of substance or as a matter of process.

For the majority in *Hickin*, Lord Sumption (at para 3) rooted the doctrine in *Cunningham Reid v Public Trustee.*[10] *Cunningham-Reid* predates the HRA by over fifty years, so manifestly took no account of Art 8. The case also concerned commercial premises rather than a home. Nor was it even a possession action. The judgment is wholly irrelevant to the question posed by D2. The only other authority Lord Sunption refers to in *Hickin* is *Tennant v Hutton*, an unreported Court of Appeal judgment from 1996, invoked only to illustrate that on the death of one joint tenant there is strictu sensu no 'succession'; rather the 'tenant' – who was formerly two persons – has now become just one person. There is no mention of Art 8 ECHR in Tennant, and obviously Art 8 of Schedule 1 did not even exist at that time.

The 'reason' for the rule offered by the majority in *Hickin* was that the survivorship doctrine it avoids potentially capricious results in cases where a surviving joint secure tenant who lived in the premises, and wanted to continue to do so, but who was not the spouse of the deceased tenant (and so not a statutory successor) could find his entitlement to do so overridden by the statutory succession entitlement of a qualified successor. One might think there are few such people compared to the numbers in Ms Hickin or D2's position. Furthermore, any such arbitrary or unfortunate results would be avoided if the rule was inapplicable only in cases in which the surviving joint tenant had no Art 8 interest in the premises.

A 'more carefully focused and penetrating analysis of the rule

The point that the Human Rights Act 1998 requires courts to re-evaluate the defensibility of established common law rules and principles was clearly stated by both Lord Nicholls and Lord Hope in *Campbell*: In Lord Hope's view (at para 86):

"The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend, Lord Hoffmann, says, has shifted. *It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating*. As Lord Woolf CJ said in *A v B plc* [2003] QB 195, 202, para 4, new breadth and strength is given to the action for breach of confidence by these articles." (Emphasis added).

Similarly, Lord Nicholls reasoned (at para 19):

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[10] [1944] KB 602.

"In applying this approach, and giving effect to the values protected by article 8, courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. *Articles 8 and 10 call for a more explicit analysis of competing considerations* …." (Emphasis added).

Lord Walker in the House of Lords in *Birmingham CC Doherty*[11] indicated that this approach was a general principle applicable in the context of possession proceedings, invoking the suggestion made in an academic article by Anthony Lester and David Pannick:

'The central legislative purpose [of the 1998 Act] is that of bringing the Convention rights home, that is, of domesticating them so that they are not regarded as alien rights protected exclusively by a "foreign" European court. To change the metaphor yet again, Convention rights must be woven into the fabric of domestic law. In the absence of a written British constitution, *it is especially important to weave the Convention rights into the principles of the common law and of equity* so that they strengthen rather than undermine those principles, including the principle of legal certainty'.

Obviously from a landlord's perspective survivorship is a very convenient tool. It means that the succession rights of a potential occupant (D2) who would succeed as an assured/secure tenant are overridden by the interests of a person who has no statutory security of tenure at all and who – since the premises are not her home – cannot even invoke (in the unlikely event that she would want to) public law or Art 8 defences.. That person (D1) has no defence of any sort to a valid notice to quit, and all that can raised by way of defence by D2 would be the minimally effective public law and Art 8 proportionality arguments.

But Art 8 is not concerned with *convenience*. It is concerned with *necessity.* And one might wonder if it is *necessary* that:

(a) When one joint dies, all of the legal interests in that home must *always* vest in the other joint tenant even if the premises have not for many years been that tenant's home and he has neither performed nor accepted any of the obligations arising from the tenancy and there is another person whose home is in the premises and who satisfies the statutory succession criteria; and

(b) No court or independent tribunal can *ever* disapply or mitigate the rigours of this rule irrespective of the circumstances of the joint tenant and the other putative successor.

The only Art 8(2) interest the doctrine could serve is that to protect the rights and freedoms of others. The only 'others' rights implicated in the scenario outlined above are D1 and C. But D1 has no Art 8 interest in these premises. She will not advance any legal interest in the tenancy when X dies. She will not challenge to the notice to quit. To the contrary, the effect of the doctrine vis a vis D1 is to impose on her an unwanted set of obligations until 'her tenancy' is determined by the landlord.

C will usually be the freehold owner of the premises in these cases. As such, it has an obvious interest in regaining possession. But it owns the premises in order to rent them. And having rented them on an assured or secure tenancy it has accepted that the use which it can make of them is controlled by the Housing Act 1985 or 1988, and that a tenant's spouse can succeed to the tenancy (or another family member if the tenancy was secure) is a commonplace feature of the statutory schemes.

If X been a sole tenant (and not himself a successor) D2 would succeed to the tenancy. Had X sought a property adjustment order per the Matrimonial Causes Act 1973 s.24 when D1 left

[11] [2008] UKHL 57; [2009] 1 AC 367 at para 109.

him and their home he would surely have been granted and D2 would succeed on his death.[12] There is no force in the argument that allowing D2 to become becoming the tenant of her home in the circumstances outlined above would in some fashion be inconsistent with the policy underlying the schemes of the Housing Act 1985 or 1988.

Further, D2 would be a tenant subject to all of the obligations of the tenancy agreement and the overlying statutory scheme. And obviously if the tenancy is an assured shorthold the Housing act s.21 procedure is always available. The incursion into C's interests which would be made by disapplying the doctrine of survivorship in a case such as this is minimal.[13] This would suggest that the interests which could be marshalled by C to be placed in the scales in opposition to D2's succession to the tenancy of her home are too slight to make it necessary for the law to deny a court any role in assessing the propriety of applying the survivorship doctrine.

Conclusion

The obvious way to achieve this result is to return to minority judgments in *Hickin*. In essence, what D2 would be asking a court to do is accept that the interpretive obligation arising under the Human Rights Act 1998 s.3 is not confined to the construction of statutory provisions in isolation, but also requires a court to adjust the meaning of statutory provisions so that the provisions themselves have the effect of overriding or redefining Art 8 incompatible rules of common law which interlock with the statutory provisions concerned.

The core of the opinions offered by Lord Mance and Lord Clarke was that the relevant provisions of the Housing Act 1985 (and by analogy those of the Housing Act 1988 for assured tenants) could properly be read – even without invoking the novel rules of construction provided for by s.3 of the Human Rights Act 1998 – as envisaging succession only to persons who occupied the premises as secure (or assured) tenants when the other joint tenant died; ie that survivorship was impliedly overridden by the statutory scheme when the survivor did not occupy the premises as her home. Interpreting the 1985 and 1988 Acts in that way would of course remove the Art 8 incompatible effect of the survivorship doctrine. If two members of a five person Supreme Court bench have construed the 1985 Act in this way it is obviously 'possible' (per s.3 of the Human Rights Act 1998) to lend it that meaning.

I ran this argument in the county court in 2015, and although it was rejected we were given permission to take the matter to the Court of Appeal. Shortly after our skeleton argument was filed and served, the landlord brought matters to an end by offering my client a new tenancy of her home. It would be nice to think the landlord was led to that positon wholly by the sheer brilliance of our skeleton argument, but one might more readily assume that the landlord was more concerned to avoid the risk of seeing the Court of Appeal produce a judgment that would deprive all social landlords of a useful housing management tool. The outcome for my client was of course very welcome. But it has no precedential value of any sort, and it would not seem outlandish to think that there a good many residents of rented housing facing a similar threat to their continued occupancy of their homes.

[12] Even if X was a successor himself, (since a person who becomes a sole tenant through an MCA order is not a successor for assured or secure tenancy purposes).

[13] The argument clearly has no applicability to tenancies of commercial premises or of residential premises which are not D2's 'home' in the Art 8 sense.